

DATE: November 4, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11959

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Ms. Erin Hogan, Esquire, Deputy Chief

Department Counsel

FOR APPLICANT

Ms. Veronica Awkard Esquire

SYNOPSIS

Applicant has been arrested 12 times between 1970 and 2000. His criminal conduct includes but is not limited to assault, disorderly conduct, and drug possession. He also intentionally falsified two security questionnaires in 1984 and 2001 by deliberately omitting information about his arrests and about past illegal drug use. He has failed to present sufficient evidence to refute or mitigate his adverse criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On November 14, 2002 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. (1) The SOR alleges facts which raise security concerns under Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

On January 13, 2003, Applicant through counsel answered the SOR (Answer), wherein he admitted all but two of the allegations and requested a hearing. The case was assigned to me on April 18, 2003. On June 2, 2003, DOHA issued a Notice of Hearing setting this case to be heard on July 9, 2003. On July 1, 2003, for personal medical reasons, I rescheduled the hearing to July 16, 2003. All parties appeared as scheduled, and DOHA received the transcript (Tr) on July 24, 2003.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 53-year-old employee of a defense contractor. He seeks a clearance in connection with his duties as an aircraft maintenance worker on his company' contract with the U.S. Air Force. He was married for 26 years, but divorced his wife in September of 2000. The couple raised a daughter, now 30-years-old.

I find that Applicant has not been credible at several points during his background investigation and at hearing. In his testimony at hearing, he contradicted his earlier sworn, written statements regarding his August 1995 and November 2001 arrests. He was also extremely evasive when questioned about the court-ordered counseling he received after his arrest in August 1995. Further, his allegations of police and investigator misconduct strain credulity. He asserts without any substantiation that the police reports of his arrests have been concocted, and that a DSS investigator somehow fabricated one of his written statements about past drug use. I do not accept Applicant's position that he has been wronged by law enforcement and investigative agents at virtually every turn when he has been involved in some adverse conduct. Likewise, I found his testimony regarding his omissions from his two security questionnaires of arrest and drug information to be contradictory and wholly without merit.

Applicant has been arrested for various acts of criminal conduct 12 times since 1970. In May 1970, when he was 19-years-old, he was charged with assault. (SOR ¶ 1.a). There is little information available about this arrest or the disposition thereof, but Applicant acknowledged at hearing that he was at a high school basketball game when a fight occurred. He was later called to the school and identified as one of the participants in the fight.

On May 18, 1977, Applicant and his wife got into an argument while they were driving together on a road near their house. A police officer attempted to pull Applicant over by following Applicant's car and turning on his emergency lights and siren. Applicant failed to stop because "[a]t the time, [he] didn't feel like it."⁽²⁾ Applicant decided to drive all the way home with the police officer in pursuit. When Applicant arrived home, he got out of his car and started to walk into the house ignoring the police officer's orders to stop. The officer drew his weapon, stopped Applicant and handcuffed him, and placed him in the back seat of the police cruiser. Applicant claims the officer struck him with a nightstick while apprehending him. In retaliation, Applicant kicked the officer in the back of the head when the officer got into the driver's seat. Applicant was charged with assault and battery, but the charge was later *nolle prosequi*. (SOR ¶ 1.b).

On July 30, 1979, Applicant was arrested and charged with assault. He had an argument with the wife of the maintenance man for the trailer park where Applicant lived at the time. She used a racial slur to which Applicant replied with his own profanity. As he was leaving to go home, the maintenance man chased after Applicant and threatened him with a garden hoe. Applicant retrieved a loaded shotgun from his trailer and threatened to use it in self defense. Both men were charged with assault, but all charges were *nolle prosequi*. (SOR ¶ 1.c).

On November 27, 1982, Applicant was riding in a car with his brother and another person, when the car was stopped by police. A search of the vehicle revealed a small quantity of marijuana in the front seat where Applicant and his brother were seated. The two men were charged with misdemeanor possession of marijuana. Applicant pled guilty to avoid the inconvenience of having to return to that jurisdiction for trial. He was placed on probation and ordered to pay a small fine. (SOR ¶ 1.d).

On June 28, 1994, Applicant was arrested and charged with disorderly conduct and disobeying a police officer. Applicant claims that he and his friends had done nothing wrong, but that the police had arbitrarily singled them out for no good reason. He was eventually found not guilty of these charges. (SOR ¶ 1.e).

On August 20, 1995, Applicant was arrested and charged with assault and battery. He was in an automobile accident either while on his way to a family gathering or while he was helping his wife move into an apartment.⁽³⁾ He was thrown from his car, and a woman at the scene tried to render aid to Applicant. She was apparently trying to keep him from getting up off the ground when Applicant pushed the woman away, got up and went to make a phone call. Applicant explains his actions as due in part to having received heart medication the day before, and consuming a small quantity of alcohol the day of the accident. At any rate, when he returned to the scene after his phone call, he was arrested and charged with assault. The charge was eventually placed on the stet docket, a procedure in Applicant's jurisdiction which suspends prosecution of minor offenses for a year. Prosecution may be resumed up to a year later if the accused is arrested for any subsequent crime.⁽⁴⁾ He was also ordered to perform community service and attend anger management counseling. (SOR ¶ 1.f).

On August 28, 1997, Applicant was convicted of driving under the influence of alcohol (DUI), and sentenced to probation before judgement a year later after he completed of an alcohol safety and awareness program. The evidence related to this arrest is unclear about when he was initially arrested for this offense. However, Applicant asserts it was the evening of this arrest when he was arrested and charged with obstructing and hindering a police officer. (SOR ¶ 1.g). Applicant testified that his parents came to get him from jail the evening of April 12, 1997 after he was arrested for DUI. Without explaining why police pulled them over, Applicant claimed he and his parents were the innocent victims of excessive force by the police. Further, he claims he and his parents won \$30,000.00 through a civil suit against the police, but he has offered no other information to support his claim.

On June 23, 1997, Applicant was arrested and charged with assault and reckless endangerment after assaulting his wife and threatening his adult daughter with a handgun at their home. Also in the home was Applicant's seven-year-old granddaughter. Applicant's daughter, then about 23-years-old, was taking a nap and was awakened by a disturbance between Applicant and his wife. She left the house to call police. When the police arrived, Applicant refused to leave until he had finished eating dinner. The charges were *nolle prosequi* in April 1998 when Applicant's wife decided not to testify against her husband. (SOR ¶ 1.h). Applicant's wife testified in his behalf, and asserted she does not remember that Applicant pushed her or that there was any altercation that led to her husband's arrest. Her testimony can best be described as inconclusive, and, having observed this witness's demeanor, particularly her body language,⁽⁵⁾ I conclude that she was not a willing witness for Applicant. She stopped short of providing outright false statements, choosing instead to respond that she did not remember certain aspects of this event. I have assigned only minimal weight

to her testimony.

On September 16, 1998, Applicant was charged with assault. After he was arrested for this charge on October 26, 1998, the case was *nolle prosequi*. (SOR ¶ 1.i).

On October 19, 1999, Applicant was involved in an auto accident wherein his car was rear-ended by another while Applicant was stopped at a traffic light. Applicant got out of his car and threatened the other driver. He also pushed the other driver. Applicant was arrested five days later and charged with assault. The charge was later *nolle prosequi*. (SOR ¶ 1.j).

In November, 2000, Applicant and his now ex-wife were living apart due to Applicant's attendance at a physical rehabilitation center in another city. Applicant suspected his wife of having an extra-marital affair. He began to call his ex-wife and her friend at odd hours of the night to threaten them with bodily harm. He also went to his ex-wife's apartment before dawn and banged on her door in a threatening manner. He was arrested and charged with telephone misuse and stalking, both misdemeanors. The charges were placed on the stet docket. (SOR ¶ 1.k). Applicant's ex-wife testified as to these events and attempted to refute the contents of the police report admitted as GE 6. For the same reasons I outlined regarding her testimony about SOR ¶ 1.h, above, I am unable to accord this evidence more than minimal weight.

Applicant first received a security clearance in 1984. When he applied for that clearance, he submitted a DD Form 48 (DD-48). He intentionally falsified that form when he omitted information about his 1982 arrest and conviction for marijuana possession. He also deliberately falsified the same form when he denied ever using illegal drugs; however, he used marijuana at least twice between 1973 and 1974. (SOR ¶ 2.c and ¶ 2.d).

Applicant more recently executed a Standard Form 86 (SF-86) on July 23, 2001. Despite the uncontroverted fact of the aforementioned arrests, Applicant chose only to list his November 2000 arrest for stalking. He was obliged by SF-86 question 26 to list any arrests within the preceding seven years, but deliberately chose to omit them. (SOR ¶ 2.b). From the same questionnaire, Applicant deliberately omitted his arrests for drug and alcohol offenses as required by the plain language of question 24 to list any such arrests regardless of when they occurred. (SOR ¶ 2.a). Applicant testified alternately that he either rushed through the questions or that he thought he only had to list those charges of which he was convicted.

POLICIES

The Directive sets forth adjudicative guidelines⁽⁶⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁷⁾ for an Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁸⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽⁹⁾

CONCLUSIONS

Guideline E (Personal Conduct). Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.⁽¹⁰⁾ Of note in this case is the government's concerns about Applicant's honesty. The government has proven its case, as alleged in SOR paragraph 2, that Applicant deliberately omitted relevant information from his DD-48 and SF-86 by deliberately omitting relevant and material information about drug and alcohol arrests and other arrests. Applicant is an intelligent person with enough education and personal experience to understand the plain meaning of each question put to him in both questionnaires. Even were I to accept (which I do not) his explanation that he thought he only had to disclose those offenses for which he was convicted, he was still obligated to disclose (which he did not) his convictions for marijuana possession in 1984 and his conviction for DUI in 1999. However, the only reasonable conclusion to be drawn from these facts is that the Applicant deliberately falsified both questionnaires, was granted access to classified

information based in part on the first questionnaire, and has continued to engage in the same mendacious behavior even at his hearing. Guideline E disqualifying condition (DC) 2-(11) applies with full effect to undermine this Applicant's suitability for continued access.

By contrast, there is no basis whatsoever in this record for application of any Guideline E mitigating condition. Applicant has shown a complete disdain for the government's interests and has chosen to perpetuate his earlier falsifications through his second SF-86 and in his testimony at hearing. Such conduct reflects a tendency toward dishonesty and only serves to reinforce the government's concerns engendered by his extensive history of aggressive, criminal conduct. I conclude Guideline E against Applicant.

Guideline J (Criminal Conduct) A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (12) This Applicant has been arrested 12 times in the past 30 years. He has repeatedly demonstrated an inability to handle conflict in a peaceful, mature way as evidenced by multiple acts of assault or threatening behavior against his own family as well as against complete strangers. He has likewise exhibited such a disregard for authority as to result in physical violence against a police officer. Applicant claims to have learned from his past conduct and asserts he is not at risk to engage in criminal conduct in the future. However, he is now over 50-years-old yet has been arrested as recently as three years ago. Given his extensive arrest record, the dearth of evidence of rehabilitation despite two periods of anger management counseling, and his failure to accept responsibility for his actions even at this late stage, there is no basis for application of any of the Guideline J disqualifying conditions. I am further persuaded that his criminal conduct renders him unsuitable for clearance by his insistence that police and investigators have falsified the police reports and one of the written statements in the record. He has failed to substantiate his claims, which have the effect of convincing me that he still does not accept responsibility for his actions. I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Despite two letters of support from a co-worker and his half-sister, I conclude Applicant is completely devoid of the requisite character, integrity and sound judgment of one in whom the government might repose its trust. The record evidence as a whole in this case presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. I conclude that Applicant's access to classified information should not be continued.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: Against the Applicant

Subparagraph 1.k: Against the Applicant

Paragraph 2, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., p. 58.
3. See, Tr., p. 39, 101, and Government's Exhibit (GE) 2.
4. Maryland Rule of Pre-trial Procedure 4-248. Applicant is aware that the charges were not dismissed by this action, but that he may be charged at the state's discretion should he be arrested while the charges were on the stet docket. (Tr., p. 102).
5. This witness would not face Applicant, would not make eye contact with him, and appeared as uncomfortable as any witness I have observed in these hearings.
6. Directive, Enclosure 2.
7. See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. See *Egan*, 484 U.S. at 528, 531.
9. See *Egan*; Directive E2.2.2.
10. Directive, E2.A5.1.1.
11. Directive, E2.A5.1.2.2. The *deliberate* omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; (emphasis added)
12. Directive, E2.A10.1.1.